No. 14747

IN THE

# United States

# Court of Appeals

FOR THE NINTH CIRCUIT

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Commercial Travelers Insurance Company, a corporation, *Appellant,*

vs.

Nova Garett Walsh, individually and as administratrix of the estate of Ralph H. Garett, deceased, *Appellee.*

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*Appeal from the United States District Court for the Eastern District of Washington Northern Division*

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## ANSWER BRIEF OF APPELLEE

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## ANSWER BRIEF OF APPELLEE

## ADDITIONAL STATEMENT OF THE CASE

As the facts herein are important, and the statement of the case by appellant is quite limited, appellee believes that a more complete statement will be of assistance to the court.

Ralph H. Garett, at the time of his death, was 42 years of age, and weighed about 123 pounds (R. 32). Since about 1948 he suffered and complained about a stomach disorder. In 1948 he had been operated upon for double hernia and had his appendix removed. Later he suffered from what his doctor called "wheat allergy." (R. 38). He suffered severely from his stomach complaint, losing sleep, vomiting, and at times he was unable to eat. He was being treated by his doctor for peptic ulcer, hepatitis and other ailments. (R. 39, 126). He was suffering considerably from allergy just prior to his death. (R. 38).

The first time there was any definite suggestion of a heart condition was in late August and early September, 1953, the month in which he died. (R. 39, 131). On September 24, 1953, the day before he died, he had come to Colville, played cards most of the day, and "felt fine" (R. 40, 41). At the time he called on his doctor in Colville, who had given him some nitroglycerin in August, and had taken a cardiogram on September 5, 1953

(R. 128). Mr. Garett still complained about his stomach and believed this was the source of his trouble. His doctor then advised him to go to Spokane to have a Dr. Galloway take x-rays of his stomach (R. 129, 131, 132).

Dr. D. Wilson McKinlay, who attended Ralph H. Garett at the time he died, testified it would not be possible to determine the presence and extent of coronary artery disease by means only of a cardiogram (R. 141).

After Mr. Garett had unloaded part of a load of seed wheat at his farm on September 24, 1953, he suffered a coronary thrombosis because of an independent, additional, unexpected, unforeseen and sudden occurence, more fully explained hereafter. He went to Spokane that evening, still believing it was his stomach trouble, to have the x-rays taken. (R. 48, 92, 93). He was promptly treated for both stomach and heart condition, although Dr. McKinlay was satisfied it was his heart. The severe pain persisted, and Mr. Garett died at 11.20 a. m. on September 25, 1953 (R. 94, 95, 96).

An autopsy was thereafter performed. According to Dr. McKinlay, (R. 100).

> "The autopsy showed an advanced condition of arterioscleriosis of the coronary arteries, known non-technically as arterioscleriosis, with marked narrowing of the lumens of two of the arteries and complete closure of one, with some scar tissue of the muscle area supplied by that particular artery, indicating an old infarct (scar)."

"It showed a marked narrowing of the anterior circumflex descending artery, with a fresh thrombus plugging it, and with the muscle supplied by that particular artery hemorrhagic and, under microscopic examination, already undergoing necrosis, verifying the fact that he had an acute coronary attack very recently.

"Q. This last condition you have described, the acute condition, was that the direct cause of the death of Ralph H. Garett, in your opinion?

"A. Yes, sir."

Dr. McKinlay testified that the blood supply to the heart of Ralph H. Garett was sufficient for ordinary exertion, sufficient to drag the wheat sacks along the truck at a steady pace (R. 115).

" . . . but when he made this extra exertion of supporting his own weight by leaning across the distance from the truck to the house and supporting partially the weight of the sack, and immediately after had the pain; it would be reasonable to assume that the amount of blood needed for the heart to take care of the extra exertion above what he had been doing would have been sufficient to produce an anoxia of the heart muscle which in turn sets up the chemical changes that produce a thrombus, and the thrombus itself then acts as a cork or a plug, stopping all blood from going through" (R. 103, 104).

According to Dr. McKinlay, immediate pain would follow the blood clot, and that this occured while Ralph H. Garett was in the awkward and strained position above related (R. 104), and that there was sufficient extra

strain to produce the acute coronary occlusion (R. 108), which in turn produced his death (R. 109). That, if he had not suffered this occlusion, he would have lived an indefinite period of time (R. 110).

Dr. McKinlay stated that the facts of the accident were not filled in on the death certificate because he had no information as to the accident when the certificate was prepared (R. 112). He further stated there would be a tremendous amount of added exertion required "to suddenly reach out supporting myself on the side of the house and grabbing a sack and holding it in an awkward, strained position, would cause a great deal more effort than slowly to lift a wheat sack up" (R. 116).

Other pertinent facts are embodied in the Findings of Fact, which are not excepted to by appellant, and, therefore, are to be accepted as true.

## ARGUMENT

1. Did decedent's death result from an intentional act, thereby barring recovery for an accident under the Washington law?

Under this heading, on page 9 of its brief, appellant bases its principal contention upon the assertion that death by accidental means "must not merely be unforeseen or unexpected but that the *means* by which death is caused must be accidental and that accident is never present when an intentional act is perfomed."

Appellee proposes to show that this statement is not applicable to the facts in this case and, further, that it does not correctly announce the law in the State of Washington, which must govern in this action.

Appellant cites as the leading Washington case, *Evans v. Metropolitan Life Insurance Co.*, 26 Wn. (2d), 594; 174 P. (2d), 961. It is the view of appellee that the above case clearly distinguishes and, in fact, emphasizes the rule for which we are contending, and which was adopted by the trial court. It is noted that numerous Washington decisions are referred to in the *Evans* case which support our contention. This case would be helpful for appellant if we had a situation in fact where Ralph H. Garett had suffered a coronary occlusion while he was merely sliding wheat sacks along the bed of the truck to the end of the plank as he intended. That would coincide

with the situation in the *Evans* case where Mr. Evans voluntarily pushed his automobile along the driveway, *and nothing unforeseen, unusual or unexpected had occured.* (our emphasis).

If however, while engaged in this voluntary act, Mr. Evans had stumbled, slipped, fallen or had gotten into some awkward or strained position after some mishap had occured, such as the car getting suddenly out of control, without time for deliberation or survey of the unexpected occurence, resulting in unforeseen exertion, and a coronary occlusion, the rule announced in the *Evans* case would have no application. The Supreme Court of Washington clearly announced the rule in the *Evans* case (p. 622) in this language:

> "The conclusion we must reach from a consideration of all the cited cases is that accident is never present when a deliberate act is performed, *unless some additional, unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death.*" (our italics).

It will surely not be contended that Ralph H. Garett was legally bound to foresee and expect that a sack of wheat would suddenly get out of control and that, in what appeared to him as a sudden emergency, and without time for deliberation or appraisal of the situation, he would suddenly reach forward and grab or jerk the sack with one hand, lean over in a strained and awkward position, with his other hand against a building some 3 to 4

feet away, with accompanying emotional stress, or that he would remain there until his son could go around the truck to assist in righting the sack. If an insured must suffer such aditional, independent, unforeseen, unusual or unexpected mishaps, happenings and accidents at his peril, there is little or no protection under the accident policy acquired by decedent.

The fact is that most of our mishaps and accidents occur when we are performing intentional and voluntary acts, such as driving a car, lifting or moving objects, and the like, and we pay premiums on our insurance policies to protect ourselves against the sudden, the unusual, the unexpected and the unforseen, which are clearly accidental.

There is no evidence in this case that Mr. Garett and his son had ever unloaded wheat in this manner previously, and this was the first sack that had gotten out of control (R. 79, 81).

Mr. Garett was having no trouble sliding the sacks along the bottom of the truck, and in doing this had suffered no pain or distress (R. 78). The additional, independent, unforeseen and unexpected accident which occured, the sudden falling and overbalancing of the sack of wheat, which his fourteen-year-old son was handling, was something additional, unexpected, independent and unforeseen in relation to what Ralph H. Garett was previously deliberately and voluntarily doing.

This rule is again recognized in *Johnson v. Business Men's Assurance Co.,* 38 Wn. (2d) 245; 228 P. (2d) 760, cited on page 11 of appellant's brief. Mr. Johnson was voluntarily and deliberately removing furniture and personal belongings from his burning home; nothing unusual, unforeseen or unexpected occured which was additional, independent or accidental, which brought about his death. This court expressly recognized the rule that had there been a "slip, fall or other unforeseen occurence," the general rule, cited by appellee above, would apply.

The last mentioned *Johnson* case, decided in 1951, appears to be the latest pronouncement in Washington upon the issues involved in this appeal. It appears that Johnson made several trips into and out of the kitchen in the burning house, and there was little, if any, smoke at first, but it increased within the house as the fire progressed. There was some contention that Johnson's collapse was in fact caused by the presence of the heavy smoke on his last trip into the house. Had this unforeseen or unexpected situation been proven, there is no doubt but that death would have been caused by a "accidental means."

As the Supreme Court clearly indicated (p. 254): No medical witness

> " . . . undertook to say that death resulted from purely acidental means, *such as inhaling of smoke,*

> *encountering heat, or suffering any other injury directly caused by the fire, and independent of all non-accidental causes, whether or not occuring during the last trip into the house."* (our emphasis).

Again, on page 255 of the above decision, the court said:

> "There was thus a lack of proof that death was due to *suddenly* encountering an *unanticipated* concentration of smoke, and was therefore the result of an unexpected and unforeseen happening, additional to and independent of Johnson's activity in saving his belongings from the burning house." (Italics by the court).

Appellee respectfully submits there is no essential difference in Mr. Johnson suddenly encountering an unanticipated concentration of smoke, as above suggested, or in Ralph H. Garett suddenly being confronted with a falling object, being something unexpected and unforeseen, in addition to and independent of what he was intentionally doing.

Finally, appellant cites the cases of *Hodges v. Mutual Benefit Association,* 15 Wn. (2d) 699; 131 P. (2d) 937; and *Crowell v. Sunset Casualty Co.,* 21 Wn. (2d) 238; 150 P. (2d) 728, in support of its argument.

In the *Hodges* case, just referred to, the insured suffered a coronary thrombosis while dancing. The Supreme Court of Washington again outlined the rule as follows: (P. 704).

> "In the case at bar, the insured was doing an ordinary and customary act in his usual way and no unexpected event interposed itself to cause injury."

In the *Crowell* case, above, the insured was a fireman at a sawmill and while at work suffered a coronary occlusion. In denying recovery under the policy, the court stated: (P. 246).

> "The record contains no evidence that any one particular event occured requiring unusual exertion on the part of the insured, which might have brought about his death . . .
> "There is no evidence suggesting the intervention of any unforeseen or even unusual agency or event."

Let it be assumed in the above case that there was proof that the insured was putting cord wood in the furnace, and the pile of wood at which he was working suddenly got out of balance and started to fall, and the insured made a sudden effort to grab a falling stick or sticks, and assumed an awkward position, and was under stress and strain, to the extent that a coronary occlusion occured and death resulted. Would appellant contend there could be no recovery under the policy because what insured was doing was intentional, that this happening was usual, to be expected and to be foreseen, and that this occurence by itself did not involve the insured, and that all the insured had to do was let the wood fall? Or that this is not accidental? Or should he not have foreseen and expected all of this in advnce? Is relief to be denied because the wood is not actually falling on the in-

sured, or the wood would not be damaged had he elected to allow it to fall on the floor, or that the whole boiler firing was a normal process, and that the insured, an experienced fireman, was bound by the possibility that this mishap might at some time occur?

On pages 14 and 15 of its brief, appellant notes that the original complaint does not allege in detail just how the accident occured. As the court knows, pleadings are deemed amended to conform to the proof, unless objected to as a variance, and the Findings of the Court are the final basis for the judgment rendered herein.

*York v. Gaasland Co.*, 41 Wn. (2d) 64, 247 P. (2d) 556.

2. Referring to the second portion of appellant's argument (page 13), appellee feels that the contention of appellant that there was no unusual, unexpected or unforeseen happening constituting an accident in this case has already been fully answered.

3. Appellant argues (page 15) that the occurence did not by itself involve Mr. Garett in any event. It is argued that the unusual occurence must happen to the insured or operate upon him without regard to his own act or volition, and must not be collateral. There is certainly nothing in the *Evans* or *Johnson* cases, mentioned by appellant on page 16, to bear out such contention, or that such argument is pertinent. All are agreed that the

stalling of the car and the burning of the house involved in the two cases just mentioned were unexpected, unusual and unforeseen, and that what these men did was voluntary. We should all be agreed, too," that in these cases had something additional and independent occured, to bring these cases within the admitted rule, the insured would have been involved, and it would not be something of his own act or volition. The illustration of the falling wood pile, in discussing the *Crowell* case, above, clearly emphasizes the distinction. Let us suppose, in the *Evans* case, that the car had gotten suddenly out of control and Mr. Evans had suffered an attack and died from over exertion while attempting to control this additional and independent happening. Could it be argued that Mr. Evans was not involved, or that this unusual occurence did not happen to or operate upon him, and was collateral, and that what he did was purely voluntary, or that he should have let the car go, or that he had no legal rights if he suffered injury or death in trying to meet this unexpected and unforeseen emergency?

*Further Washington Cases in Support of Judgment.*

One of the leading decisions relied upon by appellee herein is that of *Zinn v. Equitable Life Insurance Co.,* 6 Wn. (2d) 379, 107 P. (2d) 921.

Earl W. Zinn had high blood pressure, and, in course of treatment his doctor made an incision in the left arm to withdraw some blood. Thereafter, blood poisoning occured, from which Mr. Zinn died. The insurance company insisted that decedent did not die as a result of accident "directly and independently of all other causes, from bodily injuries affected solely through violent, external and accidental means."

It is noted that the language just quoted is quite identical to that contained in the policy now under consideration. (R. 34, 35).

In deciding the above case, the Washington Supreme Court discussed and analyzed numerous cases, comparing the two opposing views generally contended for. The accepted rule was again announced (P. 384).

> "The death is accidental, even though intentional, where the results are unusual, unexpected or unforeseen."

It was pointed out by the court that, while the making of the incision was an intentional act, and not uncommon, the infection, although it sometimes occurs, was unforeseen and unexpected, and was as much an accident as though Mr. Zinn had been struck and killed by an automobile while on his way to the hospital. The above decision was reaffirmed in the *Evans* case (P. 617).

Another pertinent decision is that of *Graham v. Police and Firemens Insurance Association,* 10 Wn. (2d) 288;

116 P. (2d) 352. Oscar H. Ebbinghouse was a fireman in Seattle and had contracted a heart condition designated as angina pectoris. While at home, his daughter's clothing caught fire while she was working in the basement. To assist his daughter, he voluntarily started down the basement steps, and while running or jumping down the steps, he fell and injured himself, and, in extinguishing the fire, his hands were severely burned. Thereafter, he became quite ill, and ten days after the mishap above described he died of a coronary occlusion.

A claim was filed for death by accidental means and the insurance company refused payment. The company claimed that, because the insured had a disease of the heart, there was no liability for death through accidental means. In upholding the right to recover under the policy, the court used this language:

> "In order to recover under a policy such as we have before us, the law does not require that a person must be in perfect health at the time an accident occurs. *Pierce v. Pacific Mutual Life Insurance Company,* 7 Wn. (2d) 151, 109 P. (2d) 322. If it were otherwise, an accident policy such as the one under consideration would be of no value after the insured had contracted some disease, regardless of the fact that premiums had been paid for many years. Such cannot be the intent of the contract. It is only necessary for the evidence to disclose that the accident was a direct and proximate cause of the death, and that the proximate cause is"
>
> " . . . that which sets in motion a train of events

> which brings about a result without the intervention of any force operating or working actively from a new and independent source."

The foregoing *Graham* case was cited and reaffirmed in the *Evans* decision (P. 618).

*Carpenter v. Pacific Mutual Life Insurance Co.,* 145 Wash. 679; 261 Pac. 792, supports the judgment in favor of appellee. The insured was a farmer. Although his hands were somewhat abraded, he deliberately and intentionally engaged in skinning a sheep. Appellant could well argue that there was no accident because what the insured did was intentional, that the resulting infection should have been expected and foreseen, and that the infection did not happen to him without his own act or volition, and was merely collateral.

Upon appeal, the court held that the insurer was liable for loss of life "resulting independently of all other causes, from bodily injuries effected through external, violent and accidental means."

The foregoing decision was reaffirmed and commented upon in the *Evans* case, as follows, (p. 615):

> "Clearly here was a case of an unsual, unexpected and unforeseen event accompanying the voluntary act prior to the injury . . . the blood poisoning infection—so that the injury might be said to be accidental means."

In the view of appellee, there is no essential difference

between the blood poisoning infection there and the coronary occlusion here, since in either instance there was an "unusual, unexpected and unforeseen event accompanying the voluntary act prior to the injury."

In the *Evans* decision, also, the death or injury involved in the following cases were reaffirmed by the Washington Supreme Court as due to accidental means in relation to the policies of accident insurance held by the respective insured. It is to be noted that in some of these cases the insurer sought to establish non-liability because of pre-existing physical ailment.

*Hanley v. Accidental Life Insurance Co.,* 164 Wash. 320; 2 P. (2d) 636. Insured suffered an accidental leg injury. An infected portion of the blood vessel surrounding the injury became detached and lodged in the insured's right lung, causing death.

*Kearney v. Washington National Insurance Co.,* 184 Wash. 579; 52 P. (2d) 903. Insured was a watchman and fell down stairs while making his rounds. Blindness resulted thereafter and it was deemed accidental, "even though at the time he was suffering from existing diseases which contributed thereto after being precipitated by the fall."

*Hill v. Great Northern Life Insurance Co.,* 186 Wash. 167; 57 P. (2d) 405. Insured had an existing coronary ailment and suffered a cerebral hemorrhage as a re-

sult of shock attendant upon an automobile collision.

*Hemrich v. Aetna Life Insurance Co.,* 188 Wash. 652; 63 P. (2d) 432. Insured slipped and fell on a sidewalk, fracturing his leg. He thereafter died of thrombosis of the pulmonary artery, originating in the region of the fracture.

*Kane v. Order of United Commercial Travelers,* 3 Wn. (2d) 355, 100 P. (2d), 1036. Insured suffered an accidental fall, which aggravated an existing hernia, requiring an operation, with resulting lumbar pneumonia and death.

*Pierce v. Pacific Mutual Life Insurance Company of California, 7 Wn. (2d) 151; 109 P. (2d)* 322. Insured was suffering from arteriosclerosis and high blood pressure. While under emotional strain and shock caused by an apparent and imminent danger of an auto collision, he suffered a cerebral hemorrhage or stroke. The insurer maintained that the condition of insured was not the result of an accident, because of his preexisting physical ailment.

The court held (p. 165) that this "was but a condition, and not a concurring cause" of the accident.

*Findings of Fact Not Excepted to by Appellant.*

On page 3 of its brief, appellant asserts:

> "The facts leading up to Ralph H. Garett's death are very little in dispute and are summarized in the trial court's Finding of Fact, to which no exception has been taken on this appeal."

Under the rule in Washington, unless Findings of Fact of the Court are specifically excepted to upon an appeal, such Findings are accepted as the established facts in the case.

*Fowles v. Sweeney,* 41 Wn. (2d) 182; 248 P. (2d) 400.

It is the earnest view of appellee that Finding of Fact number XI (R. 18, 19), in no way excepted to, is in itself decisive of this appeal. Because of its importance, we desire to quote such Findings as a part of appellee's brief:

> "That the coronary arteries of the said Ralph H. Garett had narrowed to about one-third (1/3) of their normal size, but that the amount of blood going through such coronary to supply the cardiac muscle would be a limited amount *sufficient to do ordinary exertion,* and that the said Ralph H. Garett *was able to move said sacks along the bed of said truck while he was doing so at a steady pace, and he suffered no pain therefrom.* That, when the said sack of seed wheat had gotten beyond the control of Ralph Garett, his son, as above described, and the said Ralph Garett, quickly or suddenly jerked or grabbed said falling sack, and leaned over from the end of said truck, supporting his own weight by leaning over from the end of said truck to the building near by, and partially supporting the weight of the sack of wheat with the

other hand, such situation constituted *additional* exertion so as to build up an *unusual* amount of need for blood in the heart, and, by reason thereof, the heart was unable to sustain such *additional* exertion, *and that the additional exertion, as above described, was the direct and proximate cause of an acute or sudden coronary attack being suffered by the said Ralph H. Garett, which thereafter resulted in his death from a thrombus or blood clot,* which acted as a plug to stop up all blood going through the artery to his heart. That such a closure or stoppage of the artery of said Ralph H. Garett resulted in sudden pain, evidenced almost immediately thereafter, and that the resulting blood clot was sufficient to stop the flow of blood through said artery to the heart. *The court finds that the additional exertion experienced by the said Ralph H. Garett, as above described, was sufficient to produce the thrombus or blood clot which thereafter produced the death of the said Ralph H. Garett.* (Italics ours).

A reading of the foregoing, we respectfully submit, necessarily and logically warrants the conclusions of the trial court (R.20) that the above described occurence "was an unusual, unexpected and unforeseen event, and the court *finds* that the *same* constituted an accident," and that the coronary attack as described in the Findings amounted to an accident as defined by the insurance policy, and that decedent's death "resulted directly and exclusively of all other causes, from bodily injury sustained solely through external, violent and accidental means, while he was engaged in his us-

ual occupation, and while the said contract and policy of insurance was in full force and effect, as aforesaid," and that appellant is entitled to judgment accordingly.

## Conclusion

Under the facts admitted herein, and under existing law of the State of Washington, Ralph H. Garett, now deceased, died as the result of accidental means, as contemplated and defined by the policy of insurance in force between decedent and appellant insurer herein at the time of death, and that appellee, as his widow, and as administratix of his estate, is entitled to receive payment of $3,750.00, as provided by said insurance policy, together with interest and costs by law provided. The judgment entered by the Honorable Trial Court is in all respects correct and should be affirmed.

Respectfully submitted,

RAFTIS & RAFTIS

Attorneys for Appellee.